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Supreme Court, U.S.
FILED
OCT 2 2003
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No. 03-~~382~~

In The

# Supreme Court of the United States

GARLAND D. CHERRY, JR.,

*Petitioner,*

v.

EDWARD L. ZUCKER,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## COUNTERSTATEMENT OF THE CASE

The trial court opinion sets forth a factual and procedural history in its first eighteen pages. A copy of the opinion is set forth in the Petition for Writ of Certiorari.

Cherry first instituted this lawsuit against Zucker with the filing of a Complaint on March 7, 1996. (R.1a) The case was first listed for trial on November 7, 1997, when Plaintiff asked for the matter to be moved from the list because it had settled. (R.118a) Cherry's case was relisted for trial on March 15, 1998, July 27, 1998, January 4, 1999, February 8, 1999 and April 10, 1999. Each time Cherry either requested a continuance or filed a Motion, which resulted in a continuance of the trial date. (See Trial Court Opinion) The trial finally commenced on April 23, 1999 with testimony from Cherry and Zucker. Once again the trial had to be continued since Cherry indicated he had no additional witnesses. (R.428a) Trial was specially listed to resume on October 7, 1999 and Cherry appeared once again without any witnesses. (R.6a, 10a) The court granted him four additional weeks to supplement the record with trial deposition testimony. (R.500a) During those four weeks, Cherry neither scheduled nor conducted any trial depositions.

It is interesting that Cherry's handling of Zucker's medical malpractice case followed a similar pattern. Cherry first filed suit by Writ on January 9, 1991. (R.271a-272a) The underlying medical malpractice case was first listed for trial on November 15, 1993 with Judge Clouse. (R.294a) The case was not ready for trial from Plaintiff's perspective at that point. (R.295a) The case was then assigned to the number one position on the trial list commencing April 25, 1994. (R.297a) Again the case was

not ready for trial. (R.297a) At that time the Plaintiff had no testimony from an economist or any professional sport witnesses for the damage aspect of the case. (R.302a, 303a) The case was then relisted for trial for January 9, 1995 before Judge Fitzpatrick. (R.304a) Cherry wrote to Judge Fitzpatrick requesting a continuance since "discovery is still in progress". (R.306a) Cherry's legal services were then terminated by Zucker in a letter dated February 21, 1995. On January 31, 1995, Cherry sent a letter to defense counsel stating that he would produce an expert economist to testify regarding future loss income. (R.352a-353a) As of that date, which was more than one year after the case was first listed for trial, Cherry had no economic report nor had he contacted any other damage witnesses. (R.351a)

The only expert witness that Cherry had a report from was Dr. Gessman, who was a treating cardiologist. At the time of trial, Zucker testified that Dr. Gessman, Dr. Kalish and Dr. Freelander testified as medical experts for the Plaintiff. (R.424a-425a) Thus, Cherry's statements that he had worked the case nearly to completion and was ready for trial is not accurate. After new counsel for Zucker entered his appearance, the case ultimately proceeded to trial in the spring of 1997, some two years after Cherry's withdrawal from representing Zucker.

The only evidence presented in Cherry's case against Zucker was Cherry's own testimony and that of Zucker on cross-examination. Cherry presented absolutely no evidence concerning the reasonable value of his legal services, the amount of time spent on any legal tasks while representing Zucker or his billing rates. In addition, Cherry presented no testimony from any source such as another attorney who could have testified as an expert,

reviewed Cherry's file and given an opinion as to the value of Cherry's legal services. The court entered a verdict in favor of Cherry for his legal costs and expenses, which included the payments to New Jersey counsel and paralegals. This was the only evidence presented by Cherry concerning the value of legal services rendered to Zucker.

## SUMMARY OF ARGUMENT

Cherry states he was denied his substantive due process rights because he was not given any compensation for his legal services in representing Zucker. The trial court did not award Cherry compensation for his legal services because Cherry failed to sustain his burden of proof. Cherry presented absolutely no evidence concerning the reasonable value of his legal services, the amount of time spent on any legal task in representing Zucker or his billing rates. In addition, he presented no expert testimony concerning the value of his legal services.

He also complained that he was denied his procedural due process rights because the trial judge failed to continue his case pending in the appeal of the underlying malpractice action. In fact, the trial court bent over backwards granting Cherry nine (9) continuances for the trial. There was absolutely no reason to continue Cherry's trial during the appeal of the underlying malpractice action. Cherry's claim against Zucker was for a *quantum meruit* recovery and was not dependent upon the results of the appeal in the underlying action.

## ARGUMENT

### WHETHER CHERRY WAS DENIED HIS SUBSTANTIVE DUE PROCESS RIGHTS

Cherry essentially argues that he was denied his substantive due process rights under the 14th Amendment when he was not given any compensation for his legal services in representing Zucker. Cherry was denied compensation at the conclusion of the trial because he failed to sustain his burden of proof by not presenting sufficient evidence for the Court to render an award. At oral argument on the post trial motions, the post trial judge stated the following as to why the trial judge denied compensation:. . . . "that might very well have been because you did not sustain your burden, at least in his view, of substantiating the value of what your services were, not so much that you did not do any preparation in the case to prepare for trial, but that you did not give him some rational basis on which to award you attorney's fees (Supp.R. pp. 588a-589a, also, footnote 9 in Petition for Writ for Certiorari). Even Cherry acknowledges that there may not have been a sufficient record in which to make a definitive award of compensation when he states that "Despite this, the Court denied any compensation to petitioner apparently because, in the Court's view, it did not have a sufficient record before it upon which to make a definitive award of compensation . . . (Petition for Writ for Certiorari, pg. 20)

During oral argument on the post trial motions, Judge Burr inquired as to how a court could place a valuation on the legal services rendered when there was no expert testimony nor any other testimony that would give the court some rational basis on which to award attorney's fees. (R.581b-590b) It has been held that where damages are susceptible of being proved, the amount must be

established with some certainty. *Aiken Industries, Inc., v. Estate of Wilson,* 383 A.2d 808, 813, 477 Pa. 34 (1978); *Solar Electric Corp. v. Exterminator Corp. of America,* 384 Pa. 233, 120 A.2d 533, 534 (1956).

**WHETHER CHERRY WAS DENIED ANY PROCEDURAL DUE PROCESS RIGHTS**

Next Cherry complains that he was denied his procedural due process rights because the trial judge failed to continue his case while the appeal of the underlying malpractice action was pending. Cherry indicated that this was necessary so that highly relevant evidence could be introduced in his compensation action, i.e., the use of his work product and the results obtained in the malpractice action.

The result obtained in the malpractice action, namely, a $2.7 million verdict in favor of Zucker was admitted into evidence. (R.224a) Any evidence as to whether Cherry's work product was used during the malpractice trial was excluded by the court for a number of reasons. First, there was no testimony that Cherry attended the trial or reviewed any trial transcripts. (R.254a) Thus, there was no foundation for Cherry to testify that his work product was used at the malpractice trial. Second, the Superior Court has already rejected the argument that an award to discharged counsel should be based on a comparison of the relative workload of different lawyers on a case. *Hiscott and Robinson v. King,* 426 Pa.Super. 338, 626 A.2d 1235, 1237 (1993). Finally, it would be mere speculation as to whether Cherry's work product was instrumental in obtaining a specific jury award. There were at least three medical experts who testified along with a number of

damage experts in the malpractice trial. Cherry was only involved with one medical expert who also happened to be a treating physician and was initially contacted by Zucker. It would be mere speculation to argue that any one witness or single item of evidence produced a particular jury verdict.

Thus, there was absolutely no reason for the trial court to continue Cherry's lawsuit until the underlying malpractice case was decided by the Superior Court. Cherry's lawsuit against Zucker for legal services was filed in 1996 and was not concluded until the bench verdict in February of 2000. Obviously, Zucker also had a right as a Defendant to have his case against him heard in a timely fashion. There was absolutely no prejudice to Cherry when the court refused to continue his action for a *quantum meruit* recovery. Cherry's claim for *quantum meruit* compensation was not dependent in any manner upon the decision of the Superior Court in the underlying malpractice verdict. The lower court found that there were no complexities which would warrant a continuance without end in this case which was first called to trial on March 16, 1998 and had previously been continued nine times. See *Snyder v. Port Authority of Alleghany County,* 259 Pa.Super. 448, 339 A.2d 911 (1978).

## CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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